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Held at Headquarters, New York,
on Wednesday, 3 June 1998, at 10 a.m.

Chairman:

Mr. MAZILU

(Romania)

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The meeting was called to order at 10.05 a.m.

PRIVATELY FINANCED INFRASTRUCTURE PROJECTS (continued) (A/CN.9/444/Add.2 and 3)

1. The CHAIRMAN invited the Commission to continue its consideration of the legislative recommendations and explanatory notes in document A/CN.9/444/Add.2.

Recommendation 12 (continued)

Paragraphs 28 to 54 (continued)

2. Mr. WALLACE (United States of America), referring to recommendation 12 on other relevant areas of legislation and, more specifically, contract law (paras. 51 and 52 of the explanatory notes), said that a question had been raised about the relationship between paragraph 51 and paragraphs 12 and 15, which described the legal regime of privately financed infrastructure projects but did not specify the contracts to which it applied. The general description of the importance of commercial contract law and enforceability in paragraph 51 likewise did not make it absolutely clear to which contracts such law would apply. Some countries were stricter than others in that regard. Many sponsors wished to apply regimes of commercial private law rather than public administrative law to their contracts. The issue should therefore be clarified.

3. Mr. MARADIAGA (Honduras), referring to paragraph 50, on accounting practices, said that standardization was being achieved in the area of models for generally acceptable accounting practices. The wording of the last sentence of the paragraph should therefore be strengthened to emphasize that such practices were essential. In the same spirit, the language of paragraph 54 might also be strengthened to reflect the fact that it was not just desirable, but essential, for the host country to have provisions in place that facilitated court access.

4. Mr. GUISLAIN (Observer for the World Bank), returning to recommendation 3 and paragraph 10 of the notes, suggested that the option of a "positive list" and a "negative list" of areas of activity where concessions could and could not be awarded should be offered. The text should also say more about constitutional issues; in some cases, constitutions might have to be changed to accommodate infrastructure projects as Governments shifted previously State-run activities to the private sector.

5. It would be worthwhile to explore how certain legal regimes had addressed the issues of security and collateral for infrastructure assets.

6. Mr. LALLIOT (France) said that the existence of administrative law was not in itself an obstacle to privately financed infrastructure projects. The rules of administrative law were set out clearly and known to all parties in advance. It was for the judge to interpret the law, within very strict limits. Making a distinction between civil and administrative law or public law and common law seemed to him to miss the point; the true distinction lay between countries with a clear and highly developed body of law and those whose legal system was less sophisticated.

7. It was important to keep in mind that the goal of the current exercise was not to impose one model, but to present a variety of models and to explain their advantages and disadvantages so that Governments could make an informed choice.

8. Mr. HERRMANN (Secretary of the Commission) pointed out that administrative law did not apply to the contract, but to the nature of the public entity entering into the contract. Under international law, public entities in international trade had the right to conclude arbitration agreements. Rather than thinking in terms of general categories, which was potentially misleading, it would be more helpful to look at individual issues, for example, settlement of disputes.

Paragraphs 55 to 62

9. Mr. KASHIWAGI (Japan), referring to the question of tax law (paras. 55 to 57), said that for foreign investors, predictability, stability and continuity in the tax regime and the investment environment of the host country were very important, because those factors affected project feasibility and the recovery of investment.

10. Mr. WALLACE (United States of America), referring to paragraphs 61 and 62 on settlement of disputes, said that the different levels of disputes which could arise at the different stages of a project should be reflected in the text, along with possible remedies. A reference to choice of law and governing law should also be included.

11. The International Centre for the Settlement of Investment Disputes (ICSID) had been mentioned as one forum for dispute settlement, but many other arbitration bodies were available and should be included, as ICSID was unlikely to have jurisdiction over all aspects of such disputes.

12. Mr. GUISLAIN (Observer for the World Bank) drew attention to the importance of environmental issues, which were among the major causes of disputes, and suggested that environmental law should be treated more fully in the text. More examples could be provided in paragraph 58, to give a better idea of where such problems arose.

13. With regard to disputes, many of the cases referred to ICSID did not derive from the arbitration clauses in contracts themselves, but from bilateral investment treaties which authorized arbitration. ICSID had in fact dealt with disputes involving privately funded infrastructure projects, and a discussion of such cases could be included in chapter II.

14. In connection with the environment, population resettlement as a result of infrastructure projects raised complex legal issues; a paragraph on that topic should perhaps be included to highlight its importance.

15. Mr. ESTRELLA FARIA (International Trade Law Branch) said that the purpose of paragraphs 58 to 60 was to stress the importance of a clear and stable environmental regime. Specific problems arising from project execution would be dealt with later in the text.

16. Mr. LALLIOT (France) noted that the tax law terminology used in paragraph 56 posed problems for his Government, which had a system of shared exemptions between the central and local levels.
17. Mr. TELL (France) said that only the legislative aspects of the environment had been taken into account; the preventive aspect must also be addressed. Some kind of clause on the settlement of environmental disputes was essential. The many alternative methods of dispute settlement, such as mediation, should also be included.
18. Mr. Sung-Kyu LEE (Observer for the Republic of Korea) said that his delegation was fully satisfied with paragraph 59. It felt, however, that the appeals procedures and judicial remedies cited in that paragraph should not be limited to environmental protection; such remedies should also be extended to matters of tax law, company law and property law. Disputes requiring legal remedies also arose in the areas of taxation and administrative regulation and control, which affected the normal operations of a business. In his delegation's view, a separate section should be drafted which would discuss the general protection of procedural rights in the civil, criminal and administrative areas.
19. Mr. RENGEL (Germany) noted that paragraph 61 referred to the settlement of disputes through arbitration and, in particular, the recognition and enforcement of foreign arbitral awards. For international lenders, however, the recognition and enforcement of foreign court judgements was of equal importance; determining whether a payment was or was not due did not necessarily call for the expertise of arbitrators. Reference should therefore also be made to court litigation.
20. Ms. NIKANJAM (Islamic Republic of Iran) said that her delegation was satisfied with the answer given by the representative of the Office of Legal Affairs to the point raised by the Observer for the World Bank concerning environmental protection, which was indeed a matter of crucial importance. The section on environmental protection should perhaps also refer to the United Nations Environment Programme (UNEP) and the various international conventions and agreements on environmental protection, and call on States to establish sanctions for environmental damage.
21. Mr. CHOUKRI (Observer for Morocco) said that many developing countries offered tax incentives as a means of attracting foreign investors. Paragraph 56 should also mention the various kinds of tax incentives that existed, some of which operated over limited periods of time and some of which were indefinite. Foreign investors were often interested less in tax law than in administrative procedures, since they naturally preferred to operate in favourable, transparent climates where real competition could thrive.
22. Paragraph 56 discussed mechanisms designed to compensate private investors for the taxes imposed on them. It should also mention the need for investors to establish mechanisms for protection of the environment. Private companies often had more sophisticated technology than did Governments, and they should be required to rectify the damage they caused to the environment.

23. Paragraph 61 should not only mention arbitration, which was in fact the most costly method of dispute settlement, but also call on States to reform their judicial systems and improve the operations of commercial courts. The legislative guide should include various means of dispute settlement.

24. Ms. ALLEN (United Kingdom) said that, while the Commission was understandably eager to showcase the UNCITRAL Model Law on International Commercial Arbitration, other dispute settlement mechanisms, including litigation, were also important. By way of a solution, the words "for example" might be inserted before the reference to the Model Law.

25. Mr. TELL (France) noted that the final sentence of paragraph 59 discussed the institution of legal proceedings to prevent environmental damage, while the first sentence of the French version of paragraph 60, in referring back to paragraph 59, spoke of "problèmes". The aforesaid legal proceedings could of course create problems for the establishment of privately financed infrastructure projects. However, more neutral wording should be adopted, and mention should be made of the existence of environmental protection organizations and of the public's right to seek legal remedies for environmental damage. It might also be useful to refer to the Convention on Access to Environment Information and Public Participation in Environmental Decision-Making, which had recently been opened for signature.

26. Mr. ESTRELLA FARIA (International Trade Law Branch) said that the word "problèmes" had emerged in translation; the word used in the original English text was "issues".

27. Mr. MORENO RUFFINELLI (Paraguay) agreed that protection of the environment was of the utmost importance. Paraguay's Constitution gave all citizens the right to institute legal proceedings in defence of the environment. The legislative guide afforded an opportunity to alert potential private investors to the existence of such rights and protections.

28. Ms. PIAGGI de VANOSSI (Argentina) suggested that a reference to the 1980 UNCITRAL Conciliation Rules should be included in paragraph 61. Furthermore, although difficult to put into practice, the suggestion might be included that investor countries should, in such matters, rely on the legal systems of host countries or, conversely, that host countries should rely on the legal systems of investor countries.

29. Mr. HERRMANN (Secretary of the Commission) reminded members that the object was to draft a legislative guide on privately financed infrastructure projects, not to resolve the issue of dispute settlement. Whether or not a model law on conciliation should be developed was to be discussed the following week at the New York Convention Day; the Commission had in fact been the first to develop a set of rules on conciliation. He was aware that mentioning only the UNCITRAL Model Law on International Commercial Arbitration might give rise to the misconception that the Commission preferred arbitration to other methods. He would be pleased to hear proposals as to other texts that might be mentioned, as long as those texts involved laws or conventions; a legislative guide could not take up other, less formal, methods.

30. Mr. AL-ZAID (Observer for Kuwait) said that his country had suffered terrible damage to its land and air and therefore attached great importance to the matter under consideration. His delegation believed that the section on environmental protection should be enhanced and expanded.

31. Mr. LAMBERTZ (Observer for Sweden) said that the Secretary's remarks did not resolve the issues raised with regard to paragraph 61. He agreed that paragraph 61 should reflect a wider range of possibilities and should, in particular, mention litigation as a means of dispute settlement. He shared the view of the Republic of Korea that the legislative guide should more broadly address the matter of procedural protections.

32. Ms. GUREYEVA (Russian Federation) agreed that the Secretary's remarks did not adequately address the concerns raised by members. The Commission should avoid issuing instructions that suggested that there was a single correct approach to dispute settlement; the legislative guide was meant to be flexible. Paragraph 61 should therefore be reformulated to include other forms of dispute settlement.

Recommendation 13 (paras. 63 to 67 of the notes)

33. Mr. WALLACE (United States of America) suggested that recommendation 13 should also indicate that Governments should be aware of existing international agreements to which they were already parties.

34. The second sentence of paragraph 64 should be redrafted as follows: "The most notable of those agreements have been negotiated under the auspices of the World Trade Organization (WTO) (formerly the General Agreement on Tariffs and Trade (GATT))" since GATT was still an existing agreement within WTO.

35. Reference might also be made to the Agreement on Government Procurement; although it currently had only 25 parties, there were plans to make it a general agreement to which all WTO members would be parties.

36. Mr. Sung-Kyu LEE (Observer for the Republic of Korea) said that the words "National legislation" should be dropped from the title of section C, since that section in fact dealt only with international agreements.

37. The CHAIRMAN announced that the Commission had concluded its consideration of draft chapter I of the legislative guide (A/CN.9/444/Add.2).

The meeting was suspended at 11.20 a.m. and resumed at 11.50 a.m.

38. The CHAIRMAN invited the Commission to consider draft chapter II of the legislative guide (A/CN.9/444/Add.3).

39. Mr. WALLACE (United States of America), supported by Mr. KASHIWAGI (Japan), pointed out that much of the material in draft chapter II dealt with policy, and at considerable length; there were no fewer than 25 legislative recommendations on sector structure and regulation. Since the purpose was to provide guidance, it might be desirable to shorten the recommendations, along the lines of the statement on exclusivity contained in paragraph 18 of document A/CN.9/444/Add.5.

The notes, on the other hand, could perhaps be expanded to include a definition of terms such as vertical and horizontal integration and monopoly rents. A detailed discussion of such issues could appropriately be placed in a separate annex. Regulation, which was an essential aspect of privatization, was closely linked to the operational phase of a project and should be discussed in that context.

40. Mr. LALLIOT (France) said that the notes were highly instructive and had reminded him of the changes which had taken place in recent years in a number of European countries in the sectors of telecommunications, gas and electricity supply, and railways. They argued for an end to monopolies and for the general introduction of competition in all sectors. That approach was justified in some cases, but in others was rather naive. He had the impression that, in some respects, economists had not advanced beyond the ideas in The Wealth of Nations and were overly concerned with market principles and market organization. For example, paragraph 2 of the notes contained the sentence: "Competition has been found to reduce costs and increase the productivity of infrastructure investment, as well as to enhance responsiveness to the needs of the customers". That was a peremptory statement which ought to be toned down; in some sectors, especially public services, competition was not the best way of operating and did not serve the public interest. The notes should be updated in that light.

41. Secondly, bearing in mind that the Commission was preparing a legislative guide, the present document seemed to place undue emphasis on the economic aspects of private financing, as opposed to the legal aspects dwelt upon in previous and subsequent documents. There was much discussion of the organization of the market and the role of competition in public sector projects. In that respect, he agreed with the United States representative that the recommendations should be briefer. As for the notes, they ignored the distinction drawn in French law, and in the law of other European Union countries, between sectors subject to regulation, for which permits and licences were granted, and those where relations were governed by contracts and thus largely by administrative law. The distinction was an important one for the purposes of future users of the guide.

42. Ms. PIAGGI de VANOSI (Argentina) said that the document's emphasis on competition reflected the experience of many countries in recent years. Her country had opted for privatization to the greatest possible extent, while seeking to maintain the advantages previously offered by monopolies. In her view, there were no "natural" monopolies; any party which gained control of a service by means of privatization would inevitably strive to reduce competition.

43. Mr. HERRMANN (Secretary of the Commission) explained that the substance of draft chapter II had been contributed by the Private Sector Development Department of the World Bank, which would have to be consulted if some of the chapter's contents were to be substantially altered and placed in a separate annex.

44. Mr. OLIVENCIA RUIZ (Spain) welcomed the opening statement in recommendation 1, calling for a review of the assumptions under which State monopolies had originally been established. The phenomenon of "deregulation" sometimes meant abandoning binding rules of jus cogens. For that very reason,

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it was necessary to review the practices of public monopolies before deciding whether to retain them or to open them up to free competition.

45. Mr. PEREZ (Colombia), commenting on paragraph 15, said that it was important to include a reference to the legal norms governing market protection. In his country, the courts were competent to decide whether a commercial operator had engaged in unfair competition or restrictive practices. Competition law was itself a form of regulation.

46. Mr. WALLACE (United States of America) pointed out that paragraph 28, concerning transport, made no mention of highways, bridges and tunnels, although the Channel Tunnel had been the biggest privately financed project of recent years.

47. Mr. OLIVENCIA RUIZ (Spain), referring to the term "regulatory setup" in paragraph 14 of the notes, said that if it was meant to include laws as well as regulations, the word "regulatory" was inappropriate.

48. Ms. FOLLIOT (France) said that there was some confusion in the notes between the economic activities under discussion and the legal regimes by which they were governed. The question of whether economic activities should be monopolies or open to competition was quite different from the legislative question of how they should be governed: whether by a permit issued by a public authority or under a contract between a public authority and a private company; it was the latter issue which had legal consequences. Paragraph 7 of the notes was a case in point: it stated that "a service provider operating under monopolistic conditions is typically able to fix prices", but a contract between a public authority and a private company acting alone to provide a public service must in fact exclude price fixing.

49. Mr. GUISLAIN (Observer for the World Bank) said that, while the United States representative was correct in suggesting that the recommendation should refer to highways, bridges and tunnels, he wished to point out that such infrastructure services were not always natural monopolies.

50. Replying to the representative of France, he observed that there was no absolute way of doing things; different countries simply had different legal traditions. For example, while a certain matter might be governed by a contract in one country, the same matter might be governed by a unilateral decision in another.

51. With regard to the interaction between economic policy and legal provisions, it was important to bear in mind that the Commission was discussing a topic that was evolving constantly. Over the past 15 years, tremendous changes had occurred in the area of private infrastructure; those changes had been driven by economic, technological and policy considerations. It was vital for legislators to understand overall trends in order to be able to adopt legislation that was consistent with such trends.

52. Paragraph 7 of the notes began with the phrase "From a policy perspective". That phrase indicated that the section in question highlighted economic and policy matters, while legal aspects were discussed later. It was important to

have an understanding of economic and policy matters, and of the legislative aspects that should be derived from those overall policy perspectives. The French translation of "From a policy perspective" as "Du point de vue de la politique d'Etat" was very awkward.

53. Mr. LAMBERTZ (Observer for Sweden) said that he believed that the wording "the removal of other legal impediments to competition" in recommendation 2 went too far. Such wording made it possible to claim that strict environmental law requirements or strict requirements for maintaining financial stability were legal impediments. In order to avoid any misunderstanding, he proposed the addition of the words "which can be justified by strong public interests" after "legal impediments to competition".

54. Mr. LALLIOT (France) supported the proposal made by the observer for Sweden. With regard to the comments made by the observer for the World Bank, he was not convinced that current trends were completely opposed to the monopolistic system. For example, in December 1997 the Court of Justice of the European Communities had handed down a ruling on the electricity and gas monopolies in four European countries, including France. In its ruling, the Court had recognized the monopolistic nature of the electricity and gas sectors. Referring to the Treaty establishing the European Economic Community (Treaty of Rome), he noted that, until the end of the 1980s, emphasis had been placed on articles 85 and 86, which dealt with competition; since the beginning of the 1990s, the emphasis had been on article 90, paragraph 2, which dealt with services of general economic interest. It was important to take great care and to adopt formulations and positions that were nuanced.

55. Ms. PIAGGI de VANOSI (Argentina) said that, in the Spanish version of recommendation 2, the word "prueba" should be replaced by "prohíba".

56. Ms. GUILLEN (Observer for Venezuela) said that, in the Spanish version of the first sentence of paragraph 26, it was not clear what was meant by the words "prestados por contrata". In the first sentence of paragraph 27, she requested an explanation of the word "compartimentalizar".

57. Mr. ESTRELLA FARIA (International Trade Law Branch) said that, in paragraph 26, the Spanish text should probably be amended to read "prestados por contrato". In paragraph 27, the word "compartimentalizar" had been used in the sense of "dividir".

58. Mr. LIU Yang (China), referring to paragraphs 14 and 15, said that sometimes, owing to a number of considerations, States might control immature industries and not open them up to foreign investment. From the point of view of private investors, such a policy could perhaps be considered a barrier or impediment. However, in terms of making use of foreign capital to develop industries, China could not view such State policy as an obstacle. His delegation therefore believed that the wording of paragraphs 14 and 15 should be more neutral.

59. Ms. GUREYEVA (Russian Federation) said that her delegation supported the proposal made by the observer for Sweden. She wished to know when delegations

would have an opportunity to study all the proposed amendments to the draft guide.

60. Mr. HERRMANN (Secretary of the Commission) said that, at the next session of the Commission or a working group thereof (if one was established), delegations would be able to consider a revised version of the chapters that the Commission had discussed at its current session. Delegations would also have an opportunity to consider most of the proposals when they assisted the Rapporteur in drafting the Commission's report. Since the draft guide was much longer than a statute or a convention, it was not possible for the Commission as a whole to take part in its drafting. The real drafting of the text could be done only by a limited number of people.

61. Mr. CHOUKRI (Observer for Morocco) said that his delegation supported those delegations that were not in favour of abolishing all legal barriers to competition. All countries had strategic sectors, such as natural resources, that could never be privatized. His delegation would prefer milder wording which referred to the possibility of having the private sector participate in the operation of public infrastructure.

62. Mr. KHAN (United States of America), commenting on recommendations 4 and 5, said that the section on transitional measures, contained in paragraphs 32 to 35 of the notes, did not adequately address the restructuring of utilities and their operations. Emphasis should be placed on the application of market principles to the operations of utilities. Utilities should be able to manage their finances and operations properly; that objective could be met in a private mode of operation as well as in a public sector mode of operation.

ELECTION OF OFFICERS (continued)

63. Ms. PIAGGI de VANOSI (Argentina) nominated Mr. Restrepo-Urbe (Colombia) for the office of Rapporteur.

64. Mr. Restrepo-Urbe (Colombia) was elected Rapporteur by acclamation.

The meeting rose at 12.55 p.m.